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THE POWER OF THE JUDICIARY TO DECLARE AN ACT OF CONGRESS VOID FOR UNCONSTITUTIONALITY.

In order that the national constitution should *secure* to us a republican form of government, its framers considered it a fundamental principle to separate and preserve independent the legislative, executive and judicial departments.

A division of the powers of government had become a settled principle in the formation of nearly if not all the constitutions of the original thirteen states. Therefore the framers of the national constitution established one department to make laws, and another to execute them; and having *determined* the powers of these two, they ordained and established a judicial department, and invested it with co-ordinate (but also with circumscribed) powers, to expound the constitution, to interpret the statute by comparing it with the fundamental law, to have the authority to declare what is not law, and to administer justice under the law.

In the discussion of this subject, the order of history and the logical connection of principles unite to suggest the following analysis:

I. To show that prior to the constitution the courts of the American colonies declared null, laws enacted by Parliament.

II. To show that under the confederation judicial questions of a national character were determined by a court.

III. To explain the object sought by its framers in making the powers of a constitutional government separate and independent, and in creating a judiciary co-ordinate with the other departments; also, to show that the judiciary have the right of an annulling power, by giving a history of the conventions which framed and ratified the constitution.

IV. To vindicate this right independently of the judiciary system of England, by drawing comparisons between the English and American governments.

V. To distinguish between legislative and judicial power, and to show that the latter is circumscribed by self-imposed restrictions.

VI. To review the interpretation given by its expounders of that part of the constitution which confers the national jurisdiction.

VII. To show why the judiciary should be empowered with authority to annul an Act of Congress for unconstitutionality.

I. Prior to the Constitution, the courts of the American Colonies declared null, laws enacted by Parliament.

In England, the supreme legislative authority and the power of deciding upon the constitutionality of its acts are vested in the Parliament. It is said that the maxims upon which its legislature proceeds are not defined and ascertained by any particular stated law, but that they rest entirely within the breast of the Parliament itself; and that the dignity and independence of the two houses are preserved in a great measure by keeping their privileges indefinite: 1 Wilson's Law Lectures.

But James Otis, a Massachusetts delegate to the first Continental Congress, which sat in New York City in 1765 (see Tudor's Life of James Otis (1823), p. 62), stated, in the year 1761 (a quarter of a century before the framing of our constitution), that which afterwards became the principle of American constitutional law. This declaration occurred before the Superior Court of Judicature for the Province of Massachusetts Bay, upon the grant by that court of general writs of assistance. In argument before it, he repudiated the English doctrine that Parliament is the final arbiter of the justice and constitutionality of its acts, and contended that the validity of

statutes must be determined by courts of justice. This he quoted from Viner's (English) Abridgment. Though this principle is peculiar to a republican government, and can never become incorporated into the English aristocratic system, Otis was sustained by the doctrine of Lord COKE and others of England's leading jurists—Lords HOBART and HOLT.[1]

The history of this country affords more than one example where courts of justice (before 1787) declared *acts of the supreme legislative authority null and void for unconstitutionality.*

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[1] In the year 1792, the Supreme Court of South Carolina held that an act passed by the Colonial Legislature in 1712, which was against the Magna Charta, was *ipso facto* void: *Bowman* v. *Middleton*, 1 Bay, 252.

In 1786, the Superior Court of Rhode Island refused to act under a statute of the General Assembly, which was contrary to the state constitution as embodied in the Royal Charter, Charles II. For history of Rhode Island Tender Law, reference is made to 4 Hildreth's History U. S., 34. (New York, Harper Bros., 1863.) *Trevitt* v. *Weeden*, reported by Varnum, Providence, 1787.

The legislature at once summoned the judges to answer for their conduct; they were impeached, and when their terms expired at the end of the year, the legislature supplanted four of the five judges of the court by other judges who were more supple to the legislative will: (Speech of Goddard, Annals of 7th Congress, 729.)

There is another instance where impeachment was resorted to by a state legislature upon one of its acts being annulled by the judges. Calvin Pease and George Tod were arraigned before the Ohio legislature, about the year 1808, but they were both acquitted upon the articles of impeachment: Western Law Monthly, 1863, vol. 5, p. 3, and August No. same vol.

In 1787, the judges of North Carolina set aside an act in violation of the state constitution of 1776: *Den* v. *Singleton*, Martin N. C., 49. In 1787, the judges of Virginia refused to execute a law that the judges of the Court of Appeals should be Circuit Court judges: (Speech of Calhoun, Annals of 7th Congress, 141.) The legislature apparently acquiesced in their decision, newly modelled the law (see Speech of Henderson, who said it was in 1792—Annals of 7th Congress, 527), and established a separate Court of Appeals, the judges of which were to be elected by joint ballot of the two houses, agreeably to the constitution. The judges of Appeals were relieved, and six of them were elected judges of the new Court of Appeals, now created separately—others being appointed in their places as judges of Court of Chancery, General Court and Court of Admiralty. This law the judges declared unconstitutional, not because a court which had been created by law had been abolished (for the Court of Appeals was expressly established by the constitution), but because it was an amotion from office of the whole bench of judges of Appeals, and the appointment of new judges to the same court: (Speech of Nicholson, Annals of 7th Congress, 825.)

In 1768, the highest court in Connecticut refused to grant a "writ of assistance" to Duncan Stewart, agreeably to statute 14, Charles II. After the passage of a supplemental law, 7 George III, chap. 46, declaring that the aforesaid statute applied to the colonies, and supported by an opinion of England's attorney general, De Grey, Stewart made a second application; but the court again refused to grant the writ, upon the ground that Acts of Parliament granting general writs of assistance, were unconstitutional.[1]

The General Assembly of Connecticut, before whom the petition of Stewart was subsequently brought, declared that it properly belonged for decision to the court, and it advised the court to adhere to its position. The courts of other colonies refused to grant general writs of assistance, especially in Philadelphia, upon the ground that they were unconstitutional; in fact but two of the colonies ever granted them: Massachusetts and New Hampshire.

II. *Under the Confederation, judicial questions of a national character were determined by a court.*

During the brief period of the Confederation, upon an appeal to Congress by two or more states (that being the only case in which it had jurisdiction to entertain an appeal) this was the law; in all disputes which may arise concerning boundary, jurisdiction, *or any other cause whatever*, the parties shall be directed to appoint by joint consent a *court*, for hearing and *determining* the matter in question: 9 Article. But if they disagreed, what did Congress do? Appoint a select number of its

[1] We are well informed that the officers of the customs applied the last year to the chief justice or bench of judges, in *several* of the Colonies, for granting them writs of assistance, but that those justices, from a tender regard to the constitution and the rights of American freeholders, did actually *refuse* a compliance with these demands: Boston Evening Post, June 26, 1769.

Chief Justice TRUMBULL, of the Connecticut court, said: "I have never yet seen an Act of Parliament authorizing the Court of Exchequer in giving such writs as they give, but conceive they have crept into use by the inattention of the people, and the bad practices of designing men. We are directed to give such writs as the Court of Exchequer is enabled by Act of Parliament to give, which are very different occasions of complaint from such writs as they do give:" Quincy's Massachusetts Reports, 504.

own body to try the case? No! Congress appointed a *court!* composed of *judges* selected out of each of the United States!! and from whose judgment in the case there could be no appeal! it thus appearing that the modesty of our revolutionary statesmen, in their capacity as a Congress, would not allow them to sit in judgment in any case where the validity of its acts might be called into question.

III. *The object sought by its framers in making the powers of government under a constitution, separate and independent, and in creating a judiciary co-ordinate with the other departments. The doctrine that the judiciary have the right of an annulling power is shown by giving a history of the convention which framed and ratified the constitution.*

What is a constitution? it is a written instrument, containing grants of limited power, and embodying those principles which society accepts as its fundamental law. What is the purpose of its creation? to secure the people from the oppression of their rulers.

A partial negative upon national legislation was contemplated in the first draft of a constitution submitted to the national convention by John Randolph, (5 Elliott's Deb., 126), the rejection of an Act of Congress by the executive and judiciary combined being final *unless* it were again passed by Congress. The statesmen who offered it disclaimed any intention of giving indefinite powers to the legislature; whereupon their enumeration and definition were favored in the first general debate: By James Madison, 5 Elliott's Deb., 139.

At that stage in the proceedings of the convention only one voice—Gunning Bedford, 5 Elliott's Deb., 153—had been raised against the proposed check upon the legislature, but the partial negative was agreed to, the executive alone was given revisionary control of the laws, *eight* states voting in the *affirmative*, and *two* states in the *negative*. The convention ordained and established as a necessary department a judiciary, which did not exist under the confederation: Federalist, Nos. 22, 28, 80, 81; 3 Elliott's Deb., 142, 143. The propriety of the judiciary forming a part of the "Council of Revision," was doubted by Elbridge Gerry (5 Elliott's Deb., 151), it

being maintained that it had sufficient check against encroachment upon its own department, by its exposition of the laws, which involved the power of deciding upon their *constitutionality*. It was declared that the exercise of controlling power by state courts, over the laws enacted by state legislatures had been received with *general approbation*, the colonies already having assumed the character of states. The judiciary was made independent of the Congress, both in salary and tenure of office, so that the latter could not become the virtual expositor as well as maker of the laws by an undue complaisance on the part of the judges. The organization of inferior tribunals was confided to the discretion of Congress, with the avowed object of securing a fair and impartial trial by creating a judiciary department *commensurate with the legislative authority: Martin* v. *Hunter*, 1 Wheat., 328. The appointing power of the judges, contrary to practice under the confederation, was taken from the legislature and vested in the executive, in order to make him responsible in selecting men for the judicial honors. It was argued by James Madison, (5 Elliott's Deb., 156,) that many of the members of Congress were not judges of the requisite qualifications; that a good legislator, (who might make a very poor judge), would be the one whom they would be most likely to elevate to the bench,—ignoring even the supposition that representatives in their recommendations to office could be at all governed by intrigue, partiality or bribery.

In the subsequent powerful effort to induce the convention to reconsider its vote, and to join the judiciary with the executive, as a revising power, so as to defend these co-ordinate departments from legislative encroachment, to support the executive when right, and to control him when wrong, the logic of the leading advocate of the council of revision, James Madison[1] (5 Elliott's Deb., 155), was without avail, and his measure was lost. Undismayed, again he marshalled the friends of this favorite scheme; it was proclaimed that the American constitution was in greater danger from legislative usurpations than from any other source,—that the legislature would ingulf

[1] As to his views upon the subject of annulling power, reference is made to 2 Elliott's Deb., 390.

all the other powers within its vortex,—but the original vote (establishing these departments separate) was not overthrown. Thus was secured the independence of the judiciary. In this second forensic contest participated some of the leading statesmen of the convention; and history shows that those who expressed any opinion at that time—Col. Mason, 5 Elliott's Deb., 346, 347; Luther Martin, 3 Elliott's Deb., 44, 45—were agreed as regards the power of the judiciary to declare an Act of Congress void for unconstitutionality; but, in a subsequent controversy upon this subject (a council of revision), two members of the convention—John Mercer and John Dickinson, 5 Elliott's Deb., 429—disapproved of its annulling power,—one giving no reason, and the other frankly confessing that he was at a loss what expedient to substitute.

The introduction of the subject of jurisdiction of the national tribunals did not lead to any discussion, and the proposition of James Madison, (5 Elliott's Deb., 332,) that it should extend to all cases arising under the national laws, and to such other questions as *may involve the national peace and harmony*, was agreed to without one dissenting voice. When the present second section of the third article of the constitution was reported in convention from the committee, it read: "The jurisdiction of the Supreme Court shall extend to all cases arising under the laws passed by the legislature of the United States." But it was amended without any debate or dissent, to read as follows: "The *judicial* power shall extend to all cases in law and equity, *arising under this constitution*, the laws of the United States and treaties made or which shall be made under their authority," it being generally understood that the jurisdiction given was constructively limited to cases of a judicial nature.

After a session of more than four months here ended the labors of the national convention. The constitution was transmitted to the states for adoption. Delaware, New Jersey, Georgia and Vermont appear to have adopted it without debate.

In the ratifying conventions of Massachusetts, Maryland, New Hampshire, Connecticut, New York and South Carolina, no person denied the doctrine of annulling power, and no important discussions appear to have occurred regarding the

national jurisdiction. But this great right was distinctly asserted in the Massachusetts convention by John Adams, in Connecticut by Oliver Ellsworth, and though not in that of New York by its premier, Alexander Hamilton, every reader of the "Federalist" will remember him to have held it forth therein with unrivalled eloquence and the most convincing power. In the Pennsylvania convention James Wilson was its champion, and in the North Carolina convention Wm. R. Davie, Richard Spaight, and Judge James Iredell. There were several who opposed the judiciary system, more or less, in all of the states, but the doctrine of annulling power seemed to have been so far conceded that discussion upon it was almost wholly omitted. And though some of their objections were tenable and were instrumental in effecting amendments to the constitution, yet, for anybody now in our day to maintain them he would deserve to be reminded of a North Carolina delegate, Mr. Bass (4 Elliott's Deb., 175), who said, in his dissent to the judiciary: "He reflected on no gentleman, but apologized for his ignorance by observing that he never went to school and had been born blind."

In the Virginia convention[1] the annulling power of the Judiciary was maintained by Patrick Henry, James Madison, John Marshall and Edmund Pendleton, the latter gentleman in enumerating the eleven subjects of jurisdiction as conferred upon the National Courts, by the constitution, distinctly asserting that it "extended to the laws of the federal legislature:" 3d Elliott's Deb., 517.

To review the statement of history, who advocated the power of the judiciary to annul an act of Congress for unconstitutionality? Elbridge Gerry, Gouverneur Morris, James Madison, Luther Martin, George Mason, James Wilson, Alexander Hamilton, Oliver Ellsworth, John Adams, Wm. R. Davie, Richard Spaight, James Iredell, Patrick Henry, John Marshall and Edmund Pendleton—Judge Story says that Chas. Pinckney too affirmed this doctrine in debate in S. C. Conv. in 1778, (Story

[1] Virginia was more largely represented in the constitutional convention than any other state, and the three states of Virginia, New York and Pennsylvania, exceeded in representation all the other states combined.

Constn., sec. 390, note). Who denied this power? John Mercer, John Dickinson and Gunning Bedford—fifteen men for it, three against it, or, just five to one in favor of this doctrine. It is unfortunate that the debates in Congress upon the law of Sept. 24, 1789, by which the judiciary was organized, were never collected and published; we only know that it passed in the Senate by a vote of 14 to 6, and in the house by a vote of about 31 to 11, and that the names of the members of the house who voted, are not borne upon its journal. The 25th section of that law should be regarded as a fair interpretation of the meaning of the constitution, contemporaneous with its adoption, as it has been judicially decided to have gone into operation the first Wednesday in March, 1789; *Owings* v. *Speed, et al*, 5 Wheat, 420. By this section, the construction of any clause of the constitution, or of a treaty, or statute of or commission held under the United States, has been expressly conceded to the final decision of the Supreme Court.

IV. This right can be vindicated independently of the judiciary system of England by drawing comparisons between the English and American governments.

The security of popular rights depends in a great measure upon an effective and independent judiciary, upon a tribunal possessed of incorruptible integrity and a thorough knowledge of the science of jurisprudence. The basis of the governments of England and America are unlike; therefore the principles which regulate its judiciary, will not apply to that of our own country. In England whence our ancestors came, under whose government they lived here for more than a century, and therefore were more strongly imbued with English ideas than those of any other nation, it is the doctrine that the supreme power is vested in the Parliament; consequently it has no written constitution. Whence the liberties of the English people as declared by their Magna Charta? From the Crown. Says the King: "We have *given* and *granted* to all arch-bishops, bishops, abbotts, priors, earls, barons, and to all the freemen of this our realm, these liberties following to be kept in our kingdom of England forever."

The petition of rights to Charles I, concludes: "All of which

they the people most humbly pray to be allowed as their rights and liberties, according to the laws and statutes of this our realm." 2 Elliott's Deb., 437; 1 Blackstone, 233. Even this fundamental law, if England can be said to have any, may be changed—even abolished at the pleasure of Parliament. Technically speaking, England has no written constitution, and therefore the validity of Acts of Parliament is to be understood in a far different sense than Acts of Congress under a written constitution. The King of England can do no wrong; the Parliament of England is omnipotent. But in America there exists quite another doctrine. Here the fountain of power is the people, they need no "bill of rights," for such would be an enumeration of the powers reserved. Whatever their respect for the President, they yet deny his moral infallibility, they honor their Congress, but they deny its supremacy. Certain defined powers are indeed delegated to the government, but the fee simple of power always remains vested in the people; from them it derives all its powers.

The radical difference between the governmental systems of England and America, is that of national sovereignty.

What is sovereignty? it is independence and supremacy: Smith's Constitutional Law, 119; it is the combination of all power, the power to do everything in a state without accountability: Story on the Constitution, Sec. 207. In our mother country, it is vested in the Parliament; in this republic, it is vested in the people; there, the government masters the people—here, the people master the government: 1 Wilson's Law Lectures, 426. As its government is supreme, an Act of Parliament can never be unconstitutional in the technical sense of that term: 1 Wilson's Law Lect., 428; 4 Blackstone, 435, 436; no court can defeat its intent when so plainly expressed as to leave no doubt of what is that intention.

But the United States are governed by a constitution, ordained and established, not by the states in their sovereign capacities, but by the people themselves: *Martin* v. *Hunter's Lessee*, 1 Wheat., 324; *McCulloch* v. *Maryland*, 4 Wheat., 316; *Cohens* v. *Virginia*, 6 Wheat., 264; *Rhode Island* v. *Massachusetts*, 12 Wheat., 657; 1st Kent's Commentaries, 217; hence

an Act of Congress not in accordance with the constitution is not law, and the Supreme Court in the exercise of its appellate jurisdiction will take cognizance of and decide upon that act whenever its constitutionality judicially comes before it, the court will decide which is the law,—the constitution adopted by the people, or the legislative act adopted by their agents, and if the legislative act conflicts with the fundamental law, the court will declare it null and void: 1 Wilson's Law Lect., 461; *Van Horne's Lessee* v. *Dorrance,* 2 Dallas, 304; *Taylor* v. *Porter,* 4 Hill, New York Rep., 146; *Whittington* v. *Polk,* 1 Harr. & Johns., 236.

In England representation is confined to the Commons—in the United States it pervades every branch of the government; there, the House of Lords is vested with legislative and judicial authority—here, the Senate is invested with legislative, executive and judicial powers. But the Parliament cannot infringe upon the fundamental principles of right and justice, for they control all laws of whatever government, independently of written constitutions: *De Bonham's Case,* 8 Reports, 118; *Calder* v. *Bull,* 3 Dallas, 386; *Day* v. *Savage,* Hobart, 85; *Rogers* v. *Bradshaw,* 20 J. R., 735.

No laws can enslave, destroy, or designedly impoverish a subject (except for crimes whereof he has been tried, convicted and sentenced by due process of law), for that would be to subvert the great end of civil society, which is never for the ruin of the people, but always for their safety and their common happiness: Smith's Constitutional Law, 128, 129, 131; Judge Story in *Wilkinson* v. *Leland,* 2 Peters, 654.

The English judges do not teach implicit obedience to a law which leads to absurd or immoral consequences, or to an infraction of the natural or divine law; neither do they proclaim the law itself (which may be immoral, but cannot be illegal) of no validity and null and void. The dictum of Lord Coke, is: "They hold it inapplicable, and declare that the particular case is excepted out of the statute:" Sedgwick's Constitutional Law, Sec. 153.

This nation, unwilling in the least to part with her rights, or to hold them in tail, has established limitations of power, as

between her and her servants. If then an Act of Parliament against common right and reason, or impossible to be performed, will be controlled and adjudged void by the common law, *a fortiori* will be the Acts of Congress, (even though not against natural justice), be controlled and adjudged void by the constitution.

V. *The distinctions between legislative and judicial power; the latter is circumscribed by self-imposed restrictions.*

What is legislative power? The power to make laws: 1 Blackstone, 49. What is judicial power? The power to make decrees or determine private controversies: Sedgwick's Constitutional Law, 167; it is never exercised to give effect to the will of the judge, but always to the will of the legislature, or the will of the law: 1 Kent's Com., 277; but it must regard the constitution as paramount: 1 Kent's Com., 448, 460.

In Vermont, an act granting an appeal beyond the time allowed by law, is a decree rather than a law and void: *Bates* v. *Kimball*, 2 Chip., 77; *State* v. *Fleming*, 7 Humph., 152; *De Chastellux* v. *Fairchild*, 15 Penna., 18.

An act of the state legislature declaring that a widow is entitled to dower, is a judicial determination and void: *Edwards* v. *Pope*, 3 Scam., 465.

A legislative act providing for payment of a claim, is in its nature judicial: *Watkins* v. *Holman*, 16 Peters, 25.

A court cannot declare a law void because it conflicts with the judge's opinion of policy, expediency or justice, for in such an act it would exercise legislative power. It can only guard the rights of the people when secured by a constitutional provision, which comes for consideration judicially before it. Courts have often declined to interfere with legislative acts uncontrolled by a constitution: *Bennett* v. *Boggs*, Baldwin, 74, 75; *Kirby* v. *Shaw*, 7 Harris, Penn. Rep., 258; *State* v. *Dawson*, 3 Hill, 100; *James* v. *Patton*, 2 Selden, 9; and they have refused to take up constitutional questions when not of full bench: *Mayor of N. Y.* v. *Miles*, 9 Peters, 85; *Briscoe, et al.* v. *Commonwealth Bank of Kentucky*, 9 Peters, 85. It always declined to exercise annulling power, except in cases where the invalidity of the law is clearly demonstrated: *McCulloch* v. *Maryland*, 4

Wheat., 316; *Clark* v. *People*, 26 Wend., 599; *The Sun Mutual Insurance Co.* v. *City of N. Y.*, 5 Sandford, 10; *Lane, et al.* v. *Dorman et ux.*, 3 Scam., 238; *State* v. *Springfield Township*, 6 Ind., 84; *Fletcher* v. *Peck*, 6 Cranch, 128; there must be no doubt of the law being unconstitutional: *Ogden* v. *Saunders*, 12 Wheat., 270; *People* v. *Supervisors of Orange*, 17 N. Y., 241.

It will not annul a law unless a decision upon that very point becomes necessary to the determination of the cause: *Hoover* v. *Wood*, 9 Ind., 287.

If it can decide the case independently of the constitutional question, it will do so: *Frees* v. *Ford*, 6 N. Y., 177; *Mobile & Ohio R. R.* v. *State*, 29 Ala., 573; *White* v. *Scott*, 4 Barb., 56.

It will not decide such questions when the rights of the parties are not involved: *Sinclair* v. *Jackson*, 8 Cowen, 543; *Wellington, Petitioner*, 16 Pick., 96; *State* v. *Rich*, 20 Miss., 393; *Miller* v. *State*, 3 Ohio St., 475.

If any part of a statute is good, the court will so far give it effect: *Commonwealth* v. *Clapp*, 5 Gray, 100; *Fisher* v. *McGirr*, 1 Gray, 1; *U. S. Bank* v. *Dudley's Lessee*, 2 Peters, 526.

The legislature's "motives" do not enter into the consideration of the case by the court; *People* v. *Draper*, 15 N. Y., 555; *Sunbury & Erie R. R. Co.* v. *Cooper*, 33 Penna. St., 278; *Baltimore* v. *State*, 15 Maryland, 376.

It ignores questions of a trivial nature: *People* v. *Fisher*, 24 Wendell, 220.

As regards unwise and oppressive legislation within constitutional bounds, courts refuse to interfere, claiming that they can arrest the legislative will only when it *conflicts* with a constitution; that the remedy in such cases is by an appeal to the justice and patriotism of the representatives of the people, or if that fails, then to correct the evil in their sovereign capacity: *Bennett* v. *Boggs*, Baldwin, 74; *Satterlee* v. *Matthewson*, 2 Peters, 412.

These great departments of government are responsible to the people for their acts. The people constituted a judiciary to judge of the laws; the legislature, therefore, cannot assume judicial functions, and under no circumstances can it shift its

duty upon the people in order to escape responsibility: *Parker* v. *Commonwealth*, 6 Barr, 507; *Santo* v. *State*, 2 Iowa, 165.

This right to expound the constitution and the laws has been exclusively confided to the judges from the earliest period of our history: 2 Story on Const., sec. 1842; 1 Kent's Com., 451; *Thorne* v. *Cramer*, 15 Barbour, N. Y., 112. And in England it has been claimed for them by some of those jurists who have erected her system of jurisprudence and adorned it with their learning.

Notwithstanding these self-imposed limitations, it has found ample scope for the exercise of annulling power. The first Act of Congress which came before the Supreme Court was the one entitled: "To provide for the settlement of the claims of widows and orphans, barred by the limitations heretofore established, and to regulate the claims to invalid pensioners," passed March 23, 1792. It was considered the following 5th of April, Chief Justice JAY presiding, and the court unanimously determined that the duties assigned by that law to the Circuit Courts were not of a judicial nature, inasmuch as their decisions were subject, first, to consideration and suspension by the Secretary of War, and then to revision by the legislature; whereas by the constitution no executive officer or legislature is authorized to revise the acts or opinions by the Supreme Court. The judges received this law with the most profound respect, but they declared it to be their painful duty to object thereto, although it was founded on the purest principles of humanity and justice: IREDELL, in *Hayburn* v. *U. S.*, 2 Dallas, 409, note.

In the August term of the Supreme Court, 1792, the case of Wm. Hayburn was considered, who applied to be placed on the U. S. pension list, agreeably to the law of March 23, 1792, which the judges already had declared unconstitutional. This case was argued before the court by Attorney General Randolph, but it modestly declined to pass judgment, saying that it would hold the question under advisement (viz.: the motion for mandamus to the Circuit Court for Pennsylvania to proceed under the act): *Hayburn, petitioner*, 2 Dallas, 410, note.

Hayburn presented a memorial to Congress, praying relief, April 13, 1792, and it being recognized that this was the first case in which a legislative act had been declared void by a court of justice, a committee of five was appointed to inquire into the facts and report thereon; five days afterwards, the memorial was laid on the table without debate: Annals of Second Congress, 559. This law was repealed February 28, 1793, and the question of constitutionality was not raised either in the Senate or the House, regarding the act repealed.

The next case wherein the question of constitutionality was raised before the Supreme Court, was under the act of Congress, June 5, 1794, known as the carriage-tax law, which was decided in the February term, 1796, Chief Justice ELLSWORTH, presiding. This law was declared *constitutional; Hilton* v. *United States*, 3 Dallas, 171. But in the annual statement of receipts and expenditures of the government, 1796, it is seen that Congress paid $960 66 as counsel fees to Hamilton of New York, Campbell of Virginia, and Attorney General Ingersoll of Pennsylvania.

The *constitutionality* of a *revenue* law was thus submitted to the decision of the Supreme Court with full knowledge and sanction of Congress, which paid the counsel who defended the validity of the act before the highest tribunal in the land. Annals of seventh Congress, 926.

The next case was the celebrated one of *Marbury* v. *Madison*, 1 Cranch 137, decided in February term, 1803, Chief Justice JOHN MARSHALL presiding. It arose under the Judiciary Act of 1789. The constitution conferred upon the Supreme Court original jurisdiction only in two cases; therefore for the court to issue a writ of mandamus requiring the Secretary of State to deliver a paper would be an exercise of original jurisdiction, not conferrable by Congress, and not conferred by the constitution. So much then of the 13th section of the Judiciary Act of 1789, as attempted to grant such power was declared inoperative. Interest is enlivened in the perusal of these historical incidents, by the fact that each one of these three Acts of Congress which came before the court, between the years 1792 and 1803, were decided by different Chief Justices,

JAY, ELLSWORTH and MARSHALL. In a speech made in the United States Senate in April, 1830, it was said that the Supreme Court had declared unconstitutional, two Acts of Congress, twenty-six acts of state legislatures, annulled fourteen judgments of state courts, had rendered two opinions against the President, and two also against the Secretary of State; Johnson, 4 Elliott's Deb., 523. "Behold the bleached skeletons of laws which have died of the judiciary!"[1]

VI. *The interpretation given by the expounders of the constitution of that part of it which confers the national jurisdiction.*

But it has been contended on the part of Congress, that it is a solecism to invest one body of men with authority to make laws, and at the same time to empower another body of men with authority to annul them; that such judicial power was unknown to this country as to national legislation, when the constitution was framed in 1787, and that this claim is but a dogma of the Supreme Court: Speech of Drake, U. S. Senate, Dec. 13, 1869. In a government where the power emanates from the people, and is lodged by them in separate, co-ordinate and independent departments whose rights are not inherent, but consist only of grants contained in a written constitution, where a judicial department is created uniformly to interpret, pronounce and execute the law, to decide controversies, and to enforce rights so that the government shall not perish by its own *imbecility,* or else compel the other departments to usurp powers so as to command obedience and maintain liberty, this assertion cannot stand: 2 Story on Constitution, sec. 1574, 1576. The American courts exercised this prerogative before we had a constitution. However strongly it may be contended that they had no right to do so, nevertheless they did, and with a single exception (in Rhode Island) the people sustained them. Long and well established precedents make law: *Stuart* v. *Laird,* 1803, 1 Cranch, 309; else, why did not Congress impeach the Supreme Court Judges in 1792, as did the Rhode Island Legislature its judges in 1786. No action disclosed in the proceed-

[1] For a comprehensive review of an exercise of annulling power by the judiciary, in the early history of the United States Government, reference is made to note G, Orations of Grimke, Charleston, 1827, page 106.

ings of the constitutional conventions national or state, show the most distant intent to change the then universally accepted practice of the courts, wherever they had discharged this high prerogative. No action reveals their belief that Congress could strip the judiciary of any of its jurisdiction. On the contrary the national constitution was modelled after the constitutions of nine of the thirteen original states, viz.: New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, which already had committed the general power in the last resort to distinct and independent bodies of men. No fair interpretation of the *people's command* would be given,[1] if the power to judge law were not co-extensive with the power to make law, especially when that interpretation of the constitution has been given by some of the framers themselves of that high commission: Edmund Pendleton, 3 Elliott's Debate, 517. Although there is nothing in the constitution which inhibits the legislature from revising a judicial decision, such an act would be improper upon the general principles of law and reason: *Denny* v. *Maltoon*, 2 Allen 361; whereas the revision of legislative acts by a judiciary, circumscribed by precedents, and self-imposed limitations, and knowing its acts will exist for the guidance of succeeding generations, is productive of the happiest results. It is the scale in the gold mint which detects the spurious money by a uniform standard. The judiciary cannot encroach to any sensible degree upon the legislature, by reason of its comparative weakness; for without purse or sword sustained only by the force of reason, the judges knew that they would be immediately impeached and degraded from office, for any betrayal of their high trust: Federalist No. 81.

The words "with such exceptions and under such regulations as the Congress shall make," in fairness, should be construed now as they were in 1787. In vain will any one search history for other construction of them than this: that Congress could

[1] "The judicial power shall be vested in one Supreme Court,"—"the judicial power shall extend to all cases in law and equity, arising under this constitution"—"this constitution and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land."

regulate only the appellate jurisdiction of *facts as well as law*, not the *classes of cases* which constitute the jurisdiction of the Supreme Court. There were, in 1787, four kinds of courts in our country: common law, probate, admiralty and chancery. New York, Maryland, Virginia and South Carolina had established all these courts; New Jersey had courts of common law and chancery; Pennsylvania, Delaware and North Carolina had courts of common law and admiralty; Rhode Island, Massachusetts and New Hampshire had courts of common law and probate; while Georgia had only a court of common law: Federalist, No. 83. No jury trial was had except at common law; so it is at once seen what a diversity in practice the states pursued as to this mode of trial. Therefore, in the creation of national courts, the convention left this subject of *law and fact*, and the two modes of trial which should apply thereto, according to the exigencies of the case, to the regulations and exceptions of Congress, because it could not be conveniently regulated in the constitution without dissatisfaction to the several states, each of which would be partial to its own practice. If the convention had not left this subject to the legislation of Congress, then the constitution would have to be amended by the people every time any change should be necessary. For this reason Congress may provide that in some cases the Supreme Court shall revise only matters of law, while in other cases its jurisdiction shall extend to re-examination of *facts* as well as law; but Congress is not empowered with authority to take away the case altogether. To this construction Congress has given its most solemn sanction. The legislative power shall be vested in a Congress; the judicial power shall be vested in a Supreme Court (and in such inferior courts as Congress may from time to time ordain and establish). These two phrases are analogous in meaning. If, then, the people *commanded* that the legislative power should be, and that it was vested at once in a Congress, the same reasoning applies to the judicial power, because if Congress were given any discretion it could rescind that power; but if the constitution vested it, then only the people themselves could divest it in any degree. This was a mandatory order of the people to their representatives to organize the Supreme Court; when Con-

gress executed that order the court was immediately and absolutely clothed with all the jurisdiction conferred by the constitution, precisely as the legislative power was vested in the Congress: *Martin* v. *Hunter*, 1 Wheat., 304. Could Congress withhold or abridge the tenure of office (though it did so in 1802), or the compensation of the judges? Certainly not agreeably to the understanding of the men who made the constitution. Then could Congress, at its discretion, withhold any part of that jurisdiction? If so, Congress might have refused to give it effect, and thus have defeated the will of the people.

When once vested, any restrictions or regulations, or any internal arrangements devolved upon Congress, but nothing more. In the great case of *Chisholm* v. *Georgia*, decided in the Supreme Court, in February, 1793,[1] 2 Dallas, 419, 475, where the right was confirmed that a citizen could sue the state, why did not Congress pass a law divesting the Supreme Court of appellate jurisdiction in such cases, if it were subject to any control of Congress? No such law was passed. Congress submitted this matter (of retraction of the national jurisdiction) to the *people* who adopted the eleventh amendment to the constitution, one year after the rendering of that decision. Here, the Congress most solemnly admitted that it could not strip the Supreme Court of appellate jurisdiction.

VII. *The reasons for investing the judiciary with power to annul an Act of Congress for unconstitutionality.*

The judiciary ought to be the final interpreter in constitutional and all judicial controversies. Even Thomas Jefferson, the greatest man in this country who ever opposed the annulling power of the judiciary, advised the president, in 1793, to defer to the judges of the United States Supreme Court for a construction of our treaties, the laws of nature and nations, *and the laws of the land:* 4 Jefferson's Writings, 22. He did not avow his antipathy to the judiciary until after he had retired from the presidency; and its earliest disclosure as taken from his own writings, was in a private letter dated June 11, 1815: 6 Jefferson's Writings, 462. See Jefferson's notes on Virginia,

[1] Massachusetts too, was sued in the year 1796: Appendix to 9 Dane's Abridgment, sec. 6, p. 16.

in the Federalist, No. 48. The doctrine of the "annulling power of the judiciary" was first denied in Congress by Senator Breckinridge, of Kentucky, in 1802, Annals 7 Cong., p, 179. With a few exceptions, since the formation of our government, the states of this union have cheerfully acquiesced in the decisions of the national judiciary, realizing that a peaceful submission to its benign authority is far better than to trust to their own decisions, which would institute a hydra of government from which nothing could proceed but confusion and bloodshed.[1] J. H. M.

[1] In 1810 Pennsylvania resisted an execution of process of the U. S. Court by force of arms. Her legislature proposed an amendment to the constitution to avoid future difficulty, but no state recognized the proposition: 6 Hildreth's Hist. U. S., 155 a. 165. Pennsylvania resisted an Excise Law of the United States in 1794, vi et armis, 4 Hildreth, 498.

The Virginia judiciary refused to obey the order of the Supreme Court in the case of *Martin* v. *Hunter*, 1 Wheat., 304. Georgia refused, also, in the case of *Worcester* v. *State of Georgia*, 6 Peters, 515, and *Butler* v. *Id.*, 6 Peters, 597. Her legislature, also, refused to comply with the order of the Supreme Court, allowing a writ of error to the state court in the case of "Tassels" in 1830, and "Graves" in 1834, both of whom were executed. Also, in this connection, the case of *Padelford, Fay & Co.* v. *City of Savannah*, 14 Georgia, 440, may be cited. Also, opinion of Mr. Justice BARTLEY, of the Supreme Court of Ohio, 1855, in the case of *Stunt* v. *The Steamboat Ohio*, 4 Am. Law Reg., 49, in which final arbitration is denied to U. S. Supreme Court. But see the answers of the state legislatures to the Virginia resolutions; of Rhode Island, February, 1799; New Hampshire, June, 1799; and Vermont, October, 1799: 4 Elliott's Deb., 533, 538, 539, in which they acknowledged the Supreme Court to be the final arbiter. So, too, decided Mass., February, 1799.

The decisions of the judiciary have never been disturbed by Congress: 1 Lloyd's Deb., 219, 596; 2 Lloyd's Deb., 284, 327. Chief Justice MCKEAN, (of Penna.), decided that the Supreme Court was not the final arbiter in the case of *Commonwealth* v. *Cobbett*, 3 Dall., 393; but a contrary opinion was given by Chief Justice SPENCER, (of N. Y), in case of *Andrews* v. *Montgomery*, 19 J. R., 164.

Although Virginia and Kentucky, in 1798 and 1800, denied this power to the Supreme Court, yet when Pennsylvania revolted in 1810, Virginia unanimously decided the other way, and the states of Kentucky, New Hampshire, Vermont, North Carolina, Maryland, Georgia, Tennessee and New Jersey, concurred: North American Review, October, 1830, p. 507 a. 512. And Pennsylvania decided that the Supreme Court was final arbiter in all disputes, in March, 1831: 1 Story, Const., Sec. 391, note. Also, the following decisions may be given here: *Martin* v. *Hunter*, 1 Wheat., 304 a. 334; *Cohens* v. *Virginia*, 6 Wheat., 264; *Bank of Hamilton* v. *Dudley*, 2 Peters R., 524; and *Ware* v. *Hilton*, 3 Dall., 199.